

STATE OF MICHIGAN
COURT OF APPEALS

KAREN B. VOLLMER, a/k/a KARYN B. TEAL,

Plaintiff-Appellee,

v

ERIC P. FONSTAD,

Defendant-Appellant.

UNPUBLISHED

November 13, 2003

No. 248439

Oakland Circuit Court

LC No. 01-657981-DC

Before: Whitbeck, C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's entry of a default judgment in this child custody action. We affirm.

I. Facts and Procedure

The parties were never married, but had a long-term relationship, during which time two sons were born to plaintiff. After the parties' relationship ended, plaintiff filed this action to establish custody, child support, and parenting time for the two children. On January 21, 2003, the date set for trial, defendant's counsel failed to appear in court, and the trial court entered a default. On January 22, 2003, plaintiff's counsel wrote a letter to defendant's counsel, informing him that a default had been entered and that a default judgment would be entered on February 4, 2003. On February 1, 2003, plaintiff served defendant a proposed default judgment and notice of default for entry of judgment. On February 4, 2003, the trial court entered a default judgment that awarded plaintiff physical custody of the parties' younger son and child support for that son.¹ Defendant filed a motion to set aside the default judgment, which the trial court denied. Defendant then filed a motion for reconsideration, which the trial court also denied.

II. Analysis

¹ The judgment only refers to one child, but omits the name of the child it refers to. However, the parties do not dispute that the judgment was in regard to plaintiff's younger son. Apparently, the judgment does not include plaintiff's older son, because plaintiff's older son was determined not to be defendant's biological child by a paternity test conducted on January 13, 2003.

Defendant argues that the trial court abused its discretion in denying his motion to set aside the default judgment. We disagree. A ruling on a motion to set aside a default judgment is reviewed for an abuse of discretion. *AMCO Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 94; 666 NW2d 623 (2003). An abuse of discretion exists only when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will, defiance of judgment or passion or bias. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999). Michigan law generally disfavors setting aside properly entered default judgments. *Id.* at 229.

Defendant first argues that he did not receive seven days notice of entry of the default judgment as required under MCR 2.603(B)(1). This issue was not preserved for appeal because defendant failed to raise this issue in the trial court. However, this Court may properly review an issue if the question is one of law and the facts necessary for its resolution have been presented. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98-99; 494 NW2d 791 (1992).

In the present case, the default was entered because of defendant's failure to appear for the scheduled trial. Where a default was entered for failure to appear for a scheduled trial, the party seeking a default judgment need not give the defaulted party seven days notice before entry of the requested judgment. MCR 2.603(B)(1)(d). Therefore, defendant was not entitled to seven days notice before entry of the default judgment.

Next, defendant argues that the trial court abused its discretion in denying his motion to set aside the default judgment, because he provided the court with good cause for setting aside the default judgment and an affidavit of meritorious defense. The setting aside of a default judgment is governed by MCR 2.603(D)(1), which provides: "A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed." "Good cause" may be established by showing a substantial irregularity in the proceedings upon which the default is based or a reasonable excuse for failure to comply with the requirements that created the default. *AMCO Builders & Developers, Inc, supra* at 95.

Defendant argues that there was good cause for setting aside the default judgment because defendant's counsel informed plaintiff's counsel that he would be unable to appear in court on the date set for trial. It was not until after defense counsel failed to appear for the date set for trial that he informed the court that he had been unable to appear in court on the date set for trial because he had another matter scheduled at the same date and time in another county. Defendant's counsel was aware of the scheduling conflict eight days before the trial date, and he did not provide the court with a reasonable excuse as to why he did not request an adjournment before the trial date or arrange for another attorney to appear on his behalf. Although defendant's counsel may have notified plaintiff's counsel in advance of his inability to attend court on the date scheduled for trial, and requested her to adjourn the trial on his behalf, this does not constitute a reasonable excuse for failing to comply with the requirements which led to the default. An attorney's negligence is generally attributable to that attorney's client. *Id.* at 96.

Therefore, the trial court did not abuse its discretion in determining that defendant did not have good cause to set aside the default.²

Next, defendant argues that the default judgment should have been set aside because he filed an affidavit of meritorious defense. However, the trial court shall set aside a default judgment only when good cause is shown *and* an affidavit of meritorious defense is filed. MCR 2.603(D)(1). Good cause must be shown to set aside a default judgment, even where a meritorious defense has been shown. *Barclay v Crown Building & Development, Inc*, 241 Mich App 639, 653; 617 NW2d 373 (2000). Because defendant did not show good cause to set aside the default judgment, the trial court did not abuse its discretion in denying defendant's motion to set aside the default judgment.

Affirmed.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Pat M. Donofrio

² Defendant relies on *Audretsch v Bailey*, 39 Mich App 116; 197 NW2d 311 (1972), in support of his argument that there was good cause to set aside the default judgment. In *Audretsch, supra* at 118, the trial court entered a default judgment when the defendant's counsel failed to appear on the date scheduled for trial. This Court held that the trial court abused its discretion in refusing to set aside the default judgment under the former court rule, because the trial court scheduled the trial without the defendant's counsel's knowledge for a time when the defendant's counsel had informed the court beforehand that he would be out of the country and unable to appear for trial, and the defendant was not given seven days notice of the entry of the default judgment. *Id.* at 118-119. The present case is distinguishable from *Audretsch* in that defendant's counsel did not inform the trial court beforehand that he would be unable to appear on the date scheduled for trial, and plaintiff was not required to give defendant seven days notice under the present court rule.